EZZEN HEIGHTS SDN BHD A

v.

IKHLAS ABADI SDN BHD;
SOO YUH MIAN (INTERVENER) B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SYED AHMAD HELMY JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: J-02-2454-2009] C
30 DECEMBER 2010

CONTRACT: *Building contract - Construction joint venture - Joint venture agreement and irrevocable power of attorney - Validity of - Sale of defendant's lots by plaintiff to intervener - Rule in Turquand's case - Enforceability of proprietary interest in equity - Constructive trust - Fiduciary duties, breach of - Breach of joint venture agreement - Defaulting party benefiting from its own default - Intervener not acting in good faith - Sale and purchase of defendant's lots not a bona fide transaction* D E

CONTRACT: *Joint venture - Joint venture agreement and irrevocable power of attorney - Validity of - Land development agreement - Sale of defendant's lots by plaintiff to intervener - Rule in Turquand's case - Enforceability of proprietary interest in equity - Constructive trust - Fiduciary duties, breach of - Breach of joint venture agreement - Defaulting party benefiting from its own default - Intervener not acting in good faith - Sale and purchase of defendant's lots not a bona fide transaction* F

CONTRACT: *Sale and purchase of land - Bona fide purchaser - Joint venture agreement and irrevocable power of attorney - Validity of - Land development agreement - Sale of defendant's lots by plaintiff to intervener - Rule in Turquand's case - Enforceability of proprietary interest in equity - Constructive trust - Fiduciary duties, breach of - Breach of joint venture agreement - Defaulting party benefiting from its own default - Intervener not acting in good faith - Sale and purchase of defendant's lots not a bona fide transaction* G H

I

A ***LAND LAW:*** *Development - Housing developers - Joint venture agreement and irrevocable power of attorney - Validity of - Sale of defendant's lots by plaintiff to intervener - Rule in Turquand's case - Enforceability of proprietary interest in equity - Constructive trust - Fiduciary duties, breach of - Breach of joint venture agreement -* B *Defaulting party benefiting from its own default - Intervener not acting in good faith - Sale and purchase of defendant's lots not a bona fide transaction*

LAND LAW: *Sale of land - Bona fide purchaser - Joint venture* C *agreement and irrevocable power of attorney - Validity of - Land development agreement - Sale of defendant's lots by plaintiff to intervener - Rule in Turquand's case - Enforceability of proprietary interest in equity - Constructive trust - Fiduciary duties, breach of - Breach of joint venture agreement - Defaulting party benefiting from its own default - Intervener* D *not acting in good faith - Sale and purchase of defendant's lots not a bona fide transaction*

This was an appeal by the plaintiff against the High Court's decision dismissing its originating summons ('OS') seeking, *inter alia*, a declaration that a Joint Venture Agreement ('JVA') entered E into between the plaintiff (as the landowner) and the defendant (as the developer), and an Irrevocable Power of Attorney ('IPA'), were null and void or, alternatively, a declaration that the IPA was invalid and annulled. The plaintiff and the defendant entered into the JVA to jointly develop the plaintiff's land into 12 shop- F office lots, with the plaintiff entitled to four lots and the defendant the remaining eight. After taking possession of its lots, the plaintiff unilaterally declared that the JVA had been terminated. The defendant challenged the purported termination. The plaintiff then filed the OS in the High Court but before judgment could be G delivered, the plaintiff sold the defendant's lots to the intervener. The High Court subsequently dismissed the OS, resulting in the present appeal. The determination of this appeal pivoted upon the essential question of whether the JVA and the IPA, on the facts of this case, were valid and binding. H

Held (dismissing the appeal with costs, and affirming the High Court's decision)
Per Low Hop Bing JCA delivering the judgment of the court:

I **(1)** The plaintiff's claim that the IPA was executed without the plaintiff's approval at the general meeting could not be sustained. The defendant was dealing with the plaintiff in good

faith at all material times and was acting on the directors' resolution of the plaintiff. The defendant was well protected under the rule in *Turquand*'s case. *Royal British Bank v. Turquand* (foll); *Hew Sook Ying v. Hiw Tin Hee* (foll). (para 15)

(2) The defendant's proprietary interest was enforceable in equity against the plaintiff as the constructive trustee and the intervener as the subsequent holder of the defendant's lots. In addition to the constructive trust, a fiduciary relationship had been created between the plaintiff and defendant under the JVA. Any sale by the plaintiff as constructive trustee of the defendant's lots to a third party such as the intervener herein would clearly constitute a breach of the plaintiff's fiduciary duties. *Westdeutsche Landesbank v. Islington* (foll); *Haw Par Brothers International Ltd & Anor v. Jack Chiarapurk & Ors* (foll). (paras 24-26)

(3) The plaintiff had breached its contractual obligation to obtain the relevant approval (from the appropriate authorities for the amended building plans) within the time frame prescribed and had relied on this breach to put an end to the JVA. To allow the plaintiff to do that was akin to allowing the plaintiff (as a defaulting party) to benefit from its own breach. That would be inequitable and unconscionable. *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* (foll); *Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* (foll). (para 28-32)

(4) The plaintiff failed to honour its undertaking to deposit the original issue document of the land title with the pertinent stakeholders. As a result, the defendant was unable to surrender the title to the appropriate authorities for the purpose of applying for the issuance of separate titles for the individual units of the lots. This was another example of the plaintiff breaching the JVA. (para 33)

(5) In breach of the constructive trust and fiduciary duties under the JVA, the plaintiff, without any directors' or shareholders' resolution, sold the defendant's lots to the intervener. The intervener knew or ought to have known of the defendant's prior proprietary interest in the lots but still purchased them and, furthermore, entered a private caveat on the land. In the

circumstances, the intervener was not a *bona fide* purchaser acting in good faith without notice of the rights of the beneficiary *ie*, the defendant in the instant appeal. (paras 34 & 36)

(6) Since the defendant, being the beneficial owner, was entitled to the lots, the plaintiff had no title to sell them to the intervener. Thus, the intervener could not have acquired interest in the defendant's lots and could not legally defeat the defendant's entitlement under the terms of the valid JVA. In the upshot, the sale and purchase of the defendant's lots could not be construed as a *bona fide* transaction. (para 37 & 38)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan plaintif terhadap keputusan Mahkamah Tinggi menolak saman pemulanya ('SP') menuntut, antara lain, deklarasi bahawa suatu Perjanjian Usahasama ('PU') yang dimasuki antara plaintif sebagai pemilik tanah dan defendan sebagai pemaju, dan suatu Surat Kuasa Wakil Yang Tidak Dapat Dibatalkan ('SKW'), adalah batal dan tak sah atau, sebaliknya, deklarasi bahawa SKW tidak sah dan dibatalkan. Plaintif dan defendan memasuki PU untuk sama-sama memajukan tanah plaintif menjadi 12 lot pejabat-kedai, dengan plaintif berhak memiliki empat lot dan defendan lapan. Setelah mengambil hakmilik atas lotnya, plaintif secara unilateral mengisytiharkan bahawa PU telah ditamatkan. Defendan mencabar penamatan yang dikatakan itu. Plaintif kemudiannya memfailkan SP dalam Mahkamah Tinggi tetapi sebelum penghakiman dapat dicatatkan, plaintif menjual lot defendan kepada pencelah. Mahkamah Tinggi selepas itu menolak SP, mengakibatkan rayuan semasa. Penentuan rayuan semasa berkisar atas soalan penting sama ada PU dan SKW, berdasarkan fakta kes semasa, adalah sah dan mengikat.

Diputuskan (menolak rayuan dengan kos, dan mengesahkan keputusan Mahkamah Tinggi)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Tuntutan plaintiff bahawa SKW telah dilaksanakan tanpa persetujuan plaintif di mesyuarat umum tidak dapat dipertahankan. Defendan berurusan dengan plaintif dengan

suci hati pada semua masa material dan bertindak atas resolusi pengarah-pengarah ke atas plaintif. Defendan dilindungi sewajarnya di bawah kanun di dalam kes *Turquand. Royal British Bank v. Turquand* (diikuti); *Hew Sook Ying v. Hiw Tin Hee* (diikuti).

(2) Kepentingan proprietari defendan telah dikuatkuasakan dalam ekuiti terhadap plaintif sebagai pemegang amanah konstruktif dan pencelah sebagai pemegang berikutnya lot defendan. Di samping amanah konstruktif, suatu perhubungan fidusiari telah diwujudkan di antara plaintif dan defendan di bawah PU. Apa-apa jualan oleh plaintif sebagai pemegang amanah konstruktif lot defendan kepada sesuatu pihak ketiga seperti pencelah di sini jelas merupakan pelanggaran kewajipan fidusiari plaintif. *Westdeutsche Landesbank v. Islington* (diikuti); *Haw Par Brothers International Ltd & Anor v. Jack Chiarapurk & Ors* (diikuti).

(3) Plaintif telah melanggar tanggungjawab kontraktualnya untuk memperolehi persetujuan relevan (dari pihak berkuasa yang patut bagi pelan bangunan yang dipinda) dalam jangka masa yang diperuntukkan dan telah bergantung pada pelanggaran itu untuk menamatkan PU. Untuk membenarkan plaintif berbuat demikian adalah serupa membenarkan plaintif (sebagai pihak yang mengingkar) untuk mendapat faedah dari pelanggarannya sendiri. Itu tidak berekuiti dan tidak adil. *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* (diikuti); *Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* (diikuti).

(4) Plaintif gagal melaksanakan akujanjinya untuk mendepositkan dokumen pengeluaran asal hakmilik tanah dengan pemegang amanah yang sepatutnya. Akibatnya, defendan tidak dapat menyerahkan hakmilik kepada pihak berkuasa yang patut bagi tujuan memohon untuk pengeluaran hakmilik berasingan unit-unit individu lot. Ini adalah contoh lain plaintif melanggar PU.

(5) Plaintiff telah melanggar amanah konstruktif dan kewajipan fidusiari di bawah PU apabila beliau, tanpa resolusi mana-mana pengarah atau pemegang syer, menjual lot defendan kepada pencelah. Pencelah tahu atau seharusnya tahu tentang kepentingan proprietari sebelumnya dalam lot tersebut tetapi masih telah membelinya dan, lagipun, memasukkan suatu

kaveat persendirian atas tanah. Dalam keadaan, pencelah bukan pembeli *bona fide* yang bertindak dengan suci hati tanpa notis hak-hak benefisiari, iaitu, defendan dalam rayuan semasa.

(6) Oleh kerana defendan, sebagai pemilik benefisial, berhak atas lot tersebut, plaintif tidak mempunyai hakmilik untuk menjual lot itu kepada pencelah. Oleh itu, pencelah tidak boleh memperolehi kepentingan di dalam lot defendan dan tidak dapat mengalahkan hak defendan di sisi undang-undang di bawah terma-terma PU yang sah. Oleh yang demikian, jualbeli lot defendan tidak boleh ditafsirkan sebagai transaksi *bona fide*.

[Diperintah sedemikian.]

Case(s) referred to:

Chan Thiam Teng v. Ban Swee Heng Sdn Bhd [1992] 1 LNS 37 HC ***(refd)***

Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor [1995] 2 CLJ 11 FC ***(refd)***

Connelly v. DPP [1964] AC 1254 ***(refd)***

Domnic Selvam S Gnanapragasam v. Kerajaan Malaysia & Ors [2006] 8 CLJ 114 HC ***(refd)***

Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(foll)***

Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery [1898] 1 Ch 629 ***(refd)***

Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd [2008] 6 CLJ 31 CA ***(foll)***

Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 CA ***(refd)***

Haw Par Brothers International Ltd & Anor v. Jack Chiarapurk & Ors [1991] 2 CLJ 1243; [1991] 4 CLJ (Rep) 833 HC ***(foll)***

Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(foll)***

Howard v. Patent Ivory Manufacturing Co [1888] 38 Ch D 156 ***(refd)***

K Sivapragasam Krishnar v. Renominium Development Sdn Bhd & Ors [1998] 4 CLJ 481 CA ***(refd)***

Kanssen v. Rialto (West End) Ltd [1944] Ch 346 ***(refd)***

Mahfuz Hashim v. Koperasi Pekebun Kecil Daerah Segamat; Rashid Omar & Anor (Third Party) [2004] 8 CLJ 402 HC ***(refd)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [2000] 2 CLJ 833 FC ***(refd)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

Royal British Bank v. Turquand [1885] 5 E & B 248 ***(foll)***
Standard Chartered Bank v. Central Wood Tiles Sdn Bhd [1990] 1 LNS 35 HC ***(refd)***
Westdeutsche Landesbank v. Islington [1996] AC 669 HL ***(foll)***

Legislation referred to:
Rules of the Court of Appeal 1994, r. 4
Rules of the High Court 1980, O. 92 r. 4

Other source(s) referred to:
Pennington's Company Law, 2nd edn, pp 137-138
Walter Woon's Company Law, 2nd edn, pp 89-90

For the appellant - V Rajadevan (R Ananthan with him); M/s Ananth & Assocs
For the respondent - Wong Kim Fatt (Wong Boon Lee with him); M/s Gulam & Wong
For the intervener - Devinder Kaur; M/s Syuhaila & Co

[Appeal from High Court, Johor Bahru; Originating Summons No: MT3-24-599-2009]

[Editor's note: For the High Court judgment, please see Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd [2010] 9 CLJ 225.]

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] This appeal was brought by the appellant-company ("the plaintiff") against the decision of the High Court in dismissing with costs the plaintiff's amended originating summons ("the OS") which sought, *inter alia*, a declaration that the Joint Venture Agreement entered into between the plaintiff as the landowner and the respondent-company ("the defendant") as the developer ("the JVA"), and the Irrevocable Power of Attorney ("the IPA"), both dated 4 January 2007, are null and void, or alternatively a declaration that the IPA is invalid and annulled.

A

Factual Background

[2] The plaintiff and the defendant entered into the JVA to jointly develop the plaintiff's land held under GM 473, Lot No. 412, Mukim of Padang Endau, District of Mersing, State of Johor
B ("the land") into 12 lots of 4-storey shop-offices, out of which pursuant to cl. 3(a) of the JVA, the plaintiff shall be entitled to four lots ("the plaintiff's lots") and the defendant, the remaining eight lots ("the defendant's lots"). (For brevity and convenience, a reference hereinafter to a clause is a reference to that clause in
C the JVA).

[3] On 2 January 2009 ("the completion date"), the plaintiff had taken possession of the plaintiff's lots.

[4] Subsequently, the plaintiff's former solicitors Kuan & Co,
D *vide* letter dated 10 February 2009, unilaterally declared that the JVA has been terminated.

[5] The defendant's solicitors Gulam & Wong, *vide* letter dated 1 April 2009, challenged the purported termination.

E

[6] The plaintiff then filed the OS seeking, *inter alia*, to declare the JVA and IPA null and void. Before the High Court could deliver judgment on 3 September 2009, the plaintiff had purportedly sold the defendant's lots to the intervener.

F **[7]** The plaintiff's OS was dismissed by the High Court on 3 September 2009. On 27 July 2010, we heard and dismissed the plaintiff's appeal. Our grounds are set out below.

Sole Ground Of Appeal

G

[8] The plaintiff raised eight grounds in the memorandum of appeal. However, learned counsel Mr V Rajadevan (assisted by Mr R Ananthan) relied solely on ground 4, to the effect that "the learned judge erred in law … in failing to consider that by effluxion
H of time the Joint Venture Agreement had lapsed on 4 July 2007". Plaintiff's counsel relied on the failure of the plaintiff (as the landowner) to obtain the approval for the amended building plans within the prescribed period of six months under cl. 2(a) and (b) to persuade the High Court, and now this court, to declare the
I JVA and the IPA null and void, in order to repudiate the plaintiff's liabilities under these two documents.

[9] Learned counsel Dr Wong Kim Fatt (Mr Wong Boon Lee with him) asserted for the defendant that the JVA and the IPA, executed pursuant to cl. 5 (xv), are valid. They took the view that the defendant is the beneficial owner of the defendant's lots which the plaintiff had no right to sell, and that no title whatsoever could pass to the intervener. In the circumstances, the defendant prayed for consequential orders to remove the intervener's private caveat, to restrain the plaintiff and the intervener from dealing in any manner whatsoever with the defendant's lots, to direct the plaintiff to honour the undertaking to deliver the issue document of title to the defendant, and to deliver the defendant's lots to the defendant, in the interest of justice based on the inherent jurisdiction of the court.

[10] The intervener's learned counsel Ms Devinder Kaur maintained that the intervener was a *bona fide* purchaser, and so no consequential orders should be made. The plaintiff's learned counsel associated himself with the intervener's submission.

[11] The High Court dismissed the OS holding, *inter alia*, that the JVA and the IPA are valid, and that the defendant is entitled to the defendant's lots pursuant to cl. 3(a).

[12] Upon a careful consideration of the above submissions and the decision of the High Court, we identified the question for determination in this appeal as follows:

> Upon a proper perusal of the JVA and the IPA, and in the light of the factual background unfolded above, are the JVA and the IPA valid and binding?

[13] The answer to the above question entails an in-depth discussion of important principles touching on the legal effect of the JVA and the IPA.

Legal Effect Of JVA And IPA

[14] The JVA was executed by the plaintiff's (then) directors *viz* Yong Siok Cheng and Yong Ee Chuang. The plaintiff had affixed its common seal pursuant to its directors' resolution which was duly and validly passed on 2 January 2007 in accordance with its articles of association. The IPA was prepared pursuant to cl. 5(xv) and executed by the authorized directors in accordance with the directors' resolution of the plaintiff. It was attested by the

plaintiff's own solicitors and forwarded to the defendant's solicitors on 10 January 2007. It was duly registered in the Johor Bahru High Court *vide* No. 282/2007 dated 25 January 2007. Until and unless it is dissolved, cancelled or annulled, either expressly or by implication, the directors' resolution for the JVA and the IPA shall bind and continue to bind the plaintiff in favour of the defendant: See eg, *Chan Thiam Teng v. Ban Swee Heng Sdn Bhd* [1992] 1 LNS 37.

[15] The plaintiff's claim that the IPA was executed without the plaintiff's approval at the general meeting cannot be sustained. The defendant was dealing with the plaintiff in good faith at all material times and was acting on the directors' resolution of the plaintiff. The defendant is well protected under the rule in *Turquand*'s case, *Royal British Bank v. Turquand* [1885] 5 E&B 248.

[16] This rule has been succinctly stated by the Federal Court through the judgment Mohamad Azmi SCJ (as then was) in *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120, in the following words:

> … a person dealing with a company does not need to enquire into the regularity in the internal affairs and proceedings of the company and may assume that all is being done regularly.

(See also eg, *Mahfuz Hashim v. Koperasi Pekebun Kecil Daerah Segamat; Rashid Omar & Anor (Third Party)* [2004] 8 CLJ 402, *Standard Chartered Bank v. Central Wood Tiles Sdn Bhd* [1990] 1 LNS 35; and *K Sivapragasam Krishnar v. Renominium Development Sdn Bhd & Ors* [1998] 4 CLJ 481).

[17] By way of amplification, this rule prescribes that if a person deals in good faith with the board of directors or other representative body of a company which is in fact exercising powers of management and direction of its business and affairs, that person is not affected by defects of procedure within the company or by its failure to fulfil conditions which are required by the company's memorandum or articles to be fulfilled before the act or transaction in question is effected. The legal basis of the rule is that a person dealing with a company has no right to insist on proof by its directors that the provisions of its memorandum or articles have been complied with, and he cannot therefore be

deemed to have constructive notice of some failure to comply which he has no means of discovering (*Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery* [1898] 1 Ch 629 at 636 per Lindley LJ). Of course, a person dealing with a company will not be able to rely on the rule, and the company may refuse to be bound by the transaction, if he knows that there has been some failure to comply (*Howard v. Patent Ivory Manufacturing Co* [1888] 38 Ch D 156), or if he knows facts which would lead a reasonable man to enquire further and so discover the failure to comply (*Kanssen v. Rialto (West End) Ltd* [1944] Ch 346). The rule in *Royal British Bank v. Turquand* is designed to protect persons dealing with the company, not to protect the company itself: *Pennington's Company Law* (2nd edn) at pp. 137-138.

[18] We pause here for a moment to say that the general rule in *Turquand* applies to the facts in the instant appeal. These facts however do not attract the application of the exceptions enunciated by Pennington above.

[19] Closer to our shores, *Walter Woon's Company Law* (2nd edn) pp. 89-90 explained this rule in the following passage:

> The actual authority of an agent is a relationship between principal and agent; the rest of the world is a stranger to this relationship. A third party dealing with the agent of a company does not know what the agent's actual authority is, nor in most cases can he find out. Sometimes the authority of an agent to do certain acts depends on compliance with certain formalities. For instance, it may be provided by the company's articles that the affixing of the company's seal can only be authorized by a resolution of the board. Sometimes, there is some irregularity in the management which vitiates the authority conferred upon an agent. For instance, a directors' meeting may have been irregularly held. A party outside the company has no way of determining whether the company's internal regulations have been complied with. However, the law does not require an outside party to do so. If an agent has apparent authority to do an act, a person dealing with the company is entitled to assume that all matters of internal management and procedure prescribed by the articles have been complied with. This is known as the 'indoor management rule' or the rule in *Turquand*'s case. The rule in *Turquand*'s case is a presumption of regularity. In other words, a person who deals with a company is entitled to assume that all procedural matters have been taken care of by the company. There is a good

A practical reason for this: an outsider cannot discover whether the company's internal procedures have been complied with. If a company could get out of a transaction by pleading non-compliance with its internal procedures, commercial certainty would be thrown out of the window.

B **[20]** By reason of the foregoing grounds, our answer to the above question is in the affirmative. That being the case, the plaintiff is not permitted to repudiate its liabilities under the JVA and the IPA. These liabilities are obvious upon an analysis of the following issues:

C

(1) Plaintiff as trustee and fiduciary;

(2) Plaintiff's obligation to obtain approval;

(3) Plaintiff's reliance on its own breach;

D

(4) Plaintiff's failure to honour the undertaking to deposit the issue document of title;

(5) Plaintiff's sale of defendant's lots to the intervener; and

E (6) Consequential orders.

Plaintiff As Trustee And Fiduciary

[21] Upon completion of the joint venture project on 2 January F 2009, the plaintiff became a constructive trustee in equity for the defendant in respect of the defendant's lots to which the defendant was entitled under the JVA. The defendant was the equitable or beneficial owner of the defendant's lots. This is evident in cl. 3(a) which expresses the defendant's entitlement (as G "the company" therein) in the following clear and unambiguous words:

> 3(a). It is hereby agreed by the parties hereto that the Landowner shall be entitled to four (4) lots of the four (4) story shopoffices as comprised in the Building and outline in RED in the Site Plan H (hereinafter collectively referred to as "the Landowner's Lots") upon completion of the Project whereas the Company shall be entitled to the remaining eight (8) lots of the four (4) storey shopoffices as comprised in the Building and outline in BLUE in the Site Plan (hereinafter collectively referred to as "the I Company's Lots").

[22] The said constructive trust arises by operation of law eg, from the plaintiff's unconscionable conduct or abuse of fiduciary relationship between the plaintiff as trustee (or legal owner) and the defendant as *cestui que* trust (or beneficiary). The constructive trust enables the defendant as beneficiary to enforce the trustee's ("plaintiff's") conscience in relation to the trustee's ("the plaintiff's") treatment of the beneficiary's ("defendant's") lots, or the abuse of fiduciary duties which the trustee ("the plaintiff") owes to the beneficiary ("the defendant").

[23] In *Westdeutsche Landesbank v. Islington* [1996] AC 669 HL, Lord Browne-Wilkinson propounded, *inter alia*, the following principles.

(1) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust); and

(2) Once a trust is established, as from the date of its establishment, the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

[24] Applying these principles to the instant appeal, we are of the view that the defendant's proprietary interest is enforceable in equity against the plaintiff as the constructive trustee and the intervener as the subsequent holder of the defendant's lots. The defendant as the beneficiary can trace those proprietary rights into the original property in so far as the plaintiff is considered, or the substituted property into which it can be traced, except where the intervener can prove that he is "equity's darling"; ie, 'a purchaser for value of the legal interest without notice': *Westdeutsche Landesbank v. Islington supra.*

[25] In addition to the constructive trust, a fiduciary relationship has been created between the plaintiff and the defendant under the JVA. Support for this proposition may be found in *Haw Par Brothers International Ltd & Anor v. Jack Chiarapurk & Ors* [1991] 2 CLJ 1243; [1991] 4 CLJ (Rep) 833; [1991] 2 MLJ 428. At p. 433, Chao Hick Tin J (of the Singapore High Court) held, *inter alia*, that there was a fiduciary relationship to the joint venture therein, or at least an arguable case for such a relationship.

[26] The plaintiff, being a party to the JVA, owes the defendant fiduciary duties, including the duty of utmost good faith: See eg, *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor* [1995] 2 CLJ 11 FC; *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC; *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [2000] 2 CLJ 833 FC; and *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788 CA. The plaintiff is not entitled to act in a manner contrary to these fiduciary duties. Any sale by the plaintiff as constructive trustee of the defendant's lots to a third party such as the intervener herein would clearly constitute a breach by the plaintiff of the fiduciary duties.

Plaintiff's Obligation To Obtain Approval

[27] Pursuant to cl. 2(a) and (b), the parties have expressly agreed to the plaintiff's contractual obligation of obtaining the relevant approval. The relevant portions read:

> 2(a). The parties hereto hereby expressly agree that this Agreement is subject to and conditional upon *the Landowner obtaining the approval of the appropriate authorities for the amended Building Plans (and specifications thereof) of the Building to be erected on the said Land* …
>
> 2(b). In the event any one or more of the Approvals (including any appeals relating thereto) is/are not obtained for any reason whatsoever within Six (6) Months from the date of this Agreement and unless this Agreement is extended by the parties hereto for such period(s) of time as the parties shall mutually agree upon, this Agreement shall be deemed to be automatically terminated and thereafter this Agreement shall be null and void and of no further force or effect whatsoever and neither party hereto shall have any claims whatsoever against the other. (emphasis added)

[28] Under cl. 2(a), the parties have expressly agreed, *inter alia,* that the contractual obligation of obtaining the approval from the appropriate authorities for the amended building plans rests on the landowner ie, the plaintiff. A

[29] The parties had further expressly agreed that the time frame for the plaintiff to obtain the approval for the amended building plans is six months from 4 January 2007, the date of the JVA. That would be on or before 4 July 2007. It also expressly provides that in the event the plaintiff is unable to obtain the approval by 4 July 2007, the parties may mutually agree to extend the time pursuant to cl. 2(b). B C

[30] As there was no mutual agreement to extend the time pursuant to cl. 2(b), the plaintiff was in breach of cl. 2(a) when the plaintiff's architects, Ho & Associates, submitted the amended building plans *vide* letter dated 28 August 2007 to the Pejabat Majlis Daerah Mersing (Mersing District Council) for approval. The amended building plans were only approved by the said Council on 4 November 2007, *vide* the council's letter dated 1 December 2007, thereby exceeding the prescribed time frame by four months. D E

Plaintiff Relying On Own Breach

[31] After the completion date (2 January 2009), the plaintiff had, pursuant to the letter of termination dated 10 February 2009, relied on its own breach of cl. 2(a) to put an end to the JVA. In our view, to allow the plaintiff to put an end to the JVA based on its own breach is to allow the plaintiff (as a defaulting party) to benefit from its own breach. That would be inequitable and unconscionable. This proposition is discernible from *Gimstern Corp (M) Sdn Bhd. & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC, where Wan Hamzah SCJ (as he then was), in delivering the judgment of the (then) Supreme Court, said at p. 104 F to H that: F G H

> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist I

A upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, *vide* the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd v. S.D.A.E.C.D. France* [1919] AC 1.

B **[32]** The above passage was applied by this court in *Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31 where Gopal Sri Ram JCA (later FCJ) affirmed the established principle that a party cannot rely on its own wrong to defeat its opponent's claim.

C

Plaintiff's Failure To Deposit Title

[33] Under cl. 5(xi), the plaintiff undertook to deposit the original issue document of the land title with M/s Lim & Hooi as
D stakeholders. M/s Lim & Hooi had sent a letter dated 16 January 2009 to M/s K. H. Choo & Co demanding the deposit of the title pursuant to cl 5 (xi). However that request has not been met. Till to date, the plaintiff had failed, neglected and/or refused to do so. As a result the defendant was unable to surrender the title to the
E appropriate authorities for the purpose of applying for the issuance of separate titles for the individual units of the lots in accordance with cl. 5(xi). This is another example of the plaintiff's breach of the JVA.

F **Plaintiff's Sale Of Defendant's Lots To Intervener**

[34] In breach of the constructive trust and fiduciary duties under the JVA, the plaintiff had on 6 August 2009, without any directors' resolution or shareholders' resolution, sold the defendant's lots to the intervener. The sale took place about one
G month before the judgment was delivered by the learned High Court Judge on 3 September 2009.

[35] The plaintiff had by the sale blatantly breached cl. 5(ii) which reads:

H 5. The Landowner hereby warrants, covenants and undertakes with the Company as follows:

(i) …

(ii) the Landowner shall not at any time hereafter sell, transfer,
I lease, let, charge, dispose or otherwise encumber howsoever the said Land or any part(s) thereof or any rights, interest

and or benefit therein or purport to do any of such acts or things save and except in respect of the Landowner's Lots only; A

(iii) …

[36] The issue whether the intervener is "equity's darling" has to be addressed in relation to the intervener's notice or constructive notice of the defendant's proprietary interest in the defendant's lots. Significantly, we note that as early as 6 April 2007, the defendant had entered a private caveat *vide* presentation No. 100/2007 on the land. This is evident from the defendant's application in Form 19B and the statutory declaration in support thereof. At all material times, the defendant's private caveat was still subsisting. We are of the view that the intervener knew or had notice, or ought to have known or to have notice, of the defendant's prior proprietary interest in the defendant's lots. Despite the intervener's notice or constructive notice of the defendant's private caveat, the intervener had on 26 August 2009 purchased the defendant's lots from the plaintiff. Further, the intervener had on 1 September 2009 entered a private caveat *vide* presentation No. 237/2009 on the land as in Form 19B, supported by the intervener's statutory declaration. In the circumstances, the intervener is not entitled to rely on the defence of "equity's darling" as the intervener was not a *bona fide* purchaser acting in good faith without notice of the rights of the beneficiary ie, the defendant in the instant appeal. B C D E F

[37] As the defendant, being the beneficial owner, is entitled to the defendant's lots, the plaintiff had no title to sell the defendant's lots to the intervener. The plaintiff could not pass any title to the intervener. *Nemo dat quod non habet* (No one can give what he does not have). Hence, the intervener could not have acquired the interest of the defendant's lots and could not legally defeat the defendant'' entitlement under the terms of the valid JVA. G

[38] The sale and purchase agreement entered into between the plaintiff and the intervener in respect of the defendant's lots, in the face of the proceedings pending in the High Court and before the decision of the High Court on 3 September 2009, was an affront to and a subversion of judicial proceedings. The sale and purchase of the defendant's lots cannot be construed as a *bona fide* transaction. H I

A

Consequential Orders

[39] Order 92 r. 4 confers on the High Court and, by virtue of r. 4 of the Rules of the Court of Appeal 1994, on this court, inherent powers eg, to make consequential orders to prevent
B injustice. Order 92 r. 4 merits reproduction as follows:

> 4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

C

[40] The inherent powers of the High Court and the Court of Appeal have been given statutory recognition by way of subsidiary legislation in O. 92 r. 4. These potentially wide powers are procedural and may be exercised as residuary or reserve powers
D to suppress an abuse of the process of the court and to defeat any attempted thwarting of its process: See eg, *Connelly v. DPP* [1964] AC 1254, 1301 HL per Lord Morris. These powers include all the powers that are necessary to fulfil itself as a Court of law; to uphold, to protect, and to fulfil the judicial function of
E administering justice in a regular, orderly and effective manner: per Edger Joseph JR J (later FCJ) in *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319. These powers may be invoked in an infinite variety of circumstances in pending proceedings. The categories are not
F closed: *Dominic Selvam S Gnanapragasam v. Kerajaan Malaysia & Ors* [2006] 8 CLJ 114. (On the scope of "inherent jurisdiction" and "inherent powers" of the court, see also the majority judgment delivered by me in *Ishak bin Hj Shaari v. PP*, Court of Appeal Criminal Appeal No. N-09-17-2005 dated 26 November 2010 and
G the cases cited therein).

[41] We are of the view that the facts and circumstances of the instant appeal would attract the application of O. 92 r. 4, particularly the making of consequential orders.

H

Conclusion

[42] On the foregoing grounds, we dismissed this appeal with costs of RM10,000 to the defendant, and affirmed the decision of the High Court. Deposit to be paid to the defendant on account
I of the fixed costs.

[43] Pursuant to O. 92 r. 4, we made the following consequential orders:

(1) an order that the caveat entered by the intervener *vide* presentation No. 237/2009 on 1 September 2009 on the land be forthwith removed;

(2) an order restraining the plaintiff and the intervener whether by themselves or their agents or otherwise from dealing in any manner whatsoever with the defendant's lots;

(3) an order directing the plaintiff and/or its solicitors including M/s T.S. Chong & Co., in possession of the issue document of title of the land, to forthwith deliver and deposit the original issue document of title with M/s Lim & Hooi; and

(4) an order directing the plaintiff and the intervener to deliver vacant possession of the defendant's lots to the defendant on or before 27 October 2010 ie, within three months from the date we made our order on 27 July 2010.